

NORTHWEST ENVIRONMENTAL ADVOCATES



November 27, 2013

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER
U.S. Environmental Protection Agency
1200 Sixth Avenue, CEC-124
Seattle, Washington 98101

Via E-Mail: r10.foia@epa.gov

Re: **Conservation Innovation Grant to Develop a Joint Regional Water Quality Trading Agreement between Oregon, Washington, and Idaho – Third Request, Follow-Up to FOIA No. EPA-R10-2013-004864**

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA). This request is a follow-up to FOIA No. EPA-R10-2013-004864, submitted on March 25, 2013.

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon. The organization has a long history of interest and involvement in environmental issues in the Pacific Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns EPA's involvement in the Conservation Innovation Grant (CIG) made by the U.S. Department of Agriculture's (USDA) National Resources Conservation Service (NRCS) to support the development of a Joint Regional Water Quality Trading Agreement (hereinafter "Regional Trading Agreement") between Oregon, Washington, and Idaho. On August 24, 2012, the Willamette Partnership and The Freshwater Trust announced receipt of the grant. See Willamette Partnership, *Press Release*, available at <http://willamettepartnership.org/news-and-publications/willamette-partnership-receives-1-5-million-cig-grant-from-usda>. According to this news release, EPA plays a "pivotal role" in this project to provide "clear and consistent guidance on water quality trading[.]"

This FOIA request seeks documents prepared or utilized by, in the possession of, or routed through EPA between the date of our last related FOIA request on June 26, 2013 and today.

I. FOIA Request

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other

www.NorthwestEnvironmentalAdvocates.org

P.O. Box 12187, Portland, OR 97212-0187 Phone (503) 295-0490 Fax Upon Request

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forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or utilized by, in the possession of, or routed through EPA since June 26, 2013 related to:

1. The NRCS CIG grant for the development of a Regional Trading Agreement including meetings, briefings, workshops, briefing papers, and all other forms of communication between EPA, Oregon Department of Environmental Quality, Idaho Department of Environmental Quality, Washington Department of Ecology, The Freshwater Trust, and the Willamette Partnership that are related in any way to the development and implementation of a Regional Trading Agreement and associated in any way with carrying out the substance or process of the CIG grant.

If there are large documents that you suspect we may already have, please feel free to call us and ask in order to avoid waste and/or delay. If there are any other materials or categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

In its original FOIA request, No. EPA-R10-2013-004864, NWEA was denied a fee waiver. NWEA subsequently appealed that denial on April 22, 2013 and has been informed that the fee waiver has been granted. We have attached the appeal of the previous fee waiver denial in the unlikely event that EPA decides that the fee waiver request made below is inadequate and considers the appeal to contain more detailed information justifying the grant of a fee waiver. To be clear, a fee waiver has already been granted for a FOIA request seeking the very same information as is requested in this letter but from a different time period.

A. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns guidance related to trading water quality credits in three states. Trading is a way for NPDES permittees to meet water quality-based effluent limits in lieu of pollution controls. As such it implicates the meaning of water quality standards, the meaning of NPDES permit regulations and the Clean Water Act, as well as findings in Total Maximum Daily Loads (TMDLs) and various nonpoint source programs. EPA has prepared national guidance on how water quality trading might occur. EPA has participated in a process with other state and federal agencies and non-profit organizations that seeks to create additional or superseding guidance which affects how water quality standards and TMDLs will be met in the three states. This request concerns the “the operations or activities of the government” because it concerns EPA’s participation in, evaluation of, and involvement with three states’ trading programs and potentially regional guidance on the same subject. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

EPA and three states are participating in a process with two vested interest parties which is closed to all other parties with different interests. Therefore there is no mechanism by which the public can gain insight into EPA’s input into states’ trading policies or to ascertain how other parties, including the three states, are seeking to influence EPA government operations and activities. As this CIG grant was apparently intended to exclude the public or other non-vested parties’ involvement, release of the records will most certainly contribute to an understanding of the development of EPA regional policies on water quality trading. In addition, as EPA issues NPDES permits in Idaho, the records sought will elucidate the rationale behind the agency’s decisions in that state. As EPA approves TMDLs in all three states, and maintains veto power over NPDES permits in Oregon and Washington, release of the records will allow an understanding of how trading policies in the states are implemented and how these regulatory activities are or are not consistent with existing trading policies and developing guidance. In order that the requestors may evaluate EPA’s ongoing involvement in the development of state trading guidance and implied or explicit regional trading guidance, NWEA needs access to the records that demonstrate EPA’s policies, evaluation, and conclusions. This will assist the requestors to evaluate whether EPA’s involvement is consistent with the Clean Water Act, EPA’s implementing regulations, and national guidance, and if are in the public interest. For this reason, reviewing records of EPA’s action and rationale will be “meaningfully informative” and therefore likely to contribute to an understanding of EPA’s position on water quality credit trading and its intersection with other regulatory provisions.

Having such information is “meaningfully informative” in that it ensures NWEA does not engage in frivolous or unfounded litigation and that the requestors can help the public understand what is or is not happening to ensure the consistency of all regulatory programs. Having this information will also assist NWEA in its participation in reviewing proposed trading projects in the three states.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida to assist them by conveying our understanding of EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. In addition, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders. NWEA has already shared information about water quality trading with organizations in Oregon and Washington and across the country as well as through its participation on a recent standing-room only panel at the Public Interest Environmental Law Conference sponsored by the University of Oregon Law School. NWEA will share information with the Idaho Conservation League and the Northwest Environmental Defense Center just as ICL has shared information with NWEA on this very process. *See* UPDATE #2 – April 20, 2013, Water Quality Trading: Innovation or Hoax?, Northwest Environmental Advocates at <http://northwestenvironmentaladvocates.org/water-quality-trading-innovation-or-hoax/> (“A set of documents from a open record request filed by the Idaho Conservation League with the Idaho Department of Environmental Quality is now available.”). Materials obtained from previous FOIA requests have been posted on NWEA’s website. [Http://www.northwestenvironmentaladvocates.org/nweafiles/WQ_Trading/FOIA_EPA/](http://www.northwestenvironmentaladvocates.org/nweafiles/WQ_Trading/FOIA_EPA/). In future, analysis of these records will be provided to the public.

In addition to using their relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies. For example, on March 15, 2013, NWEA sent EPA Region X a letter discussing two topics of concern relating to water quality credit trading and its consistency with EPA regulations. This letter has been circulated to concerned citizens in the basin where the featured trade took place as well as to organizations in the region and across the country. It has been posted on NWEA’s website.

NWEA’s investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, TMDL development, and permit issuances, all of which occur regularly. NWEA’s dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA’s guidance and regulations insofar as they affect permitting and water quality credit trading. Thus, the release of these records will significantly contribute to the public’s understanding and oversight of EPA’s decision-making under the Clean Water Act.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water credit trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

D. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute “significantly” to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government’s activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA’s knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass’n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors’ statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project’s] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM’s position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress’ intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a “close call” as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization’s statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor’s statements concerning the

agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the EPA and its interactions with state regulatory agencies. In general, such organizations need to understand how and why a government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in EPA actions and inactions and in state actions. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation.

This request seeks records concerning EPA's involvement in the development of state water quality credit trading policies for three states, a process in which some vested interests are involved but all other members of the public and representatives of other interests are excluded. Obtaining the requested records will allow NWEA to understand EPA's policy or policies and take appropriate action to ensure the requirements of the Clean Water Act are met in Oregon, Idaho, and Washington. Only by understanding the EPA's interpretation of its own regulations and guidance can NWEA meaningfully participate in their public oversight watchdog function. NWEA will also disseminate the information to organizations they work with across the country through listserves, websites, meetings, memoranda, and direct sharing of the records. This issue is of interest to journalists who have covered the use of water quality credit trading.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. And, unlike the two non-profit organizations involved in the subject matter of this FOIA request, NWEA has no vested interest in the outcome of trading programs. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or nbell@advocates-nwea.org if you have any questions about how to respond to this request.

EPA FOIA Officer (Regional Trading Agreement – Third Request)
November 27, 2013
Page 7

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large loop at the beginning and a trailing flourish.

Nina Bell
Executive Director

Encl.: Appeal of Denial of Fee Waiver Request: FOIA No. EPA-R10-2013-004864